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No. 00-0407, 00-0417, 00-0427

IN THE

SUPREME COURT OF THE UNITED STATES

David Fichtenberg,
Micahael C. Worsham,
Cellular Phone Taskforce,

vs.

Federal Communications Commission and the United States of America, Respondents

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On Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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85pp

QUESTIONS PRESENTED

1. Whether comment on a matter that would lawfully require consideration when the lead agency in a rule making has expertise in the matter also requires such consideration when the lead agency does not have such expertise?

2. Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

3. Whether lead agencies not expert in a health or environment matter may follow procedures 'functionally equivalent' to the National Environmental Policy Act (NEPA) and so avoid their formal NEPA requirements, and whether FCC did so?

4. Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption and sec. 253(b) provides for States protecting public safety?

6. Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

LIST OF PARTIES

List of Parties in proceeding below is given in the List of Parties section in each of the petitions 00-0393, 00-0407, 00-417, and 00-427.

Parties supported by this brief in support are David Fichtenberg (#00-0407), Michael C. Worsham (#00-0417), and Cellular Phone Taskforce ("CPT") (#00-0427).

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Opinions Below

In addition to reports in petitions supported, note that the Federal Communications Commission ("FCC") First Order in Notice 96-326 reported at 11 F.C.C. Rcd, 15123 (1996) established a 'transition' period. During this time previous FCC RF guidelines for station applications continued in effect [sec. 47 CFR 1.130(b)(4)]. 47 CFR 1.1307(b)(4)(i) continues in effect for certain services "Radio Frequency Protection Guides" recommended in the "American National Standard Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 300 kHz to 100 GHz" (ANSI C95.1-1982). For other services 47 CFR 1.1307 (b)(4)(ii) continues the RF guideline "IEEE C95.1-1991 (ANSI C95.1-1992) Safety Levels With Respect to Human Exposure To Radio Frequency Electromagnetic Fields 3 kHz to 300 GHz." These were lodged with the Court with petition #00-0407.

Jurisdiction

This brief is in support of certain petitions for writ of certiorari and is being filed pursuant to Rule 12.6 and Rule 24.2. It regards request of the judgment of the U.S. Court of Appeals for the Second Circuit in consolidated cases 97-4328 (L), 98-4003(Con.), 98-4005(Con.), and 98-4122(Con.). The original opinion is reported as *Cellular Phone Taskforce et al. v. FCC*, 205 F.3d 82 (2d Cir. 2000). The petitions supported are the petitions for certiorari of David Fichtenberg (Docket #00-0407), Michael C. Worsham (Docket # 00-0417) both docketed September 15, 2000, and in support of CPT (Docket #00-0427) docketed September 20, 2000. This brief is being filed on October 5, 2000 which is within the 20 day period

for filing provided by Rule 12.6.

This brief does not address support for the petition of Citizens For Appropriate Placement for Telecommunications Facilities et al. ("Citizens"), docket #00-0393, docketed September 13, 2000, because the date for formally expressing such support has past. I am an individually named party in the above named Court of Appeals case, with my name appearing on page 6 of the Court of Appeals docket report, and shall limit comments to additional points not in petitions already filed with the Court.

Certain affidavits, including those presented or referenced in the proceeding below are discussed further in Statement of the Case. Parties submitting these affidavits indicate how they are adversely affected by the challenged rulemaking. A favorable ruling by this Court would provide them significant relief.

Hearing Examiner documents at p.62-68 pertain to Mr. Fichtenberg's role as spokesperson for organizations in Seattle, Washington. 1996-present [see his petition at 11-15.]. Mr. Fichtenberg is President of Ad-Hoc Association of Parties Concerned About the FCC RF Health and Safety Rules (AHA), a party in the proceeding below. Its standing is discussed at p2-7 in the principal brief joined by all petitioners below, except CPT [see J.Hobson letter at 60]. Harms to AHA's mission impact Mr. Fichtenberg whose duties are to further it.

Constitutional and Statutory Provisions

In addition to the constitutional and statutory provisions already noted in the Petitions, 42 USC 1983 [p. 37], 47 USC 332(a) [p. 44] and (c)(3)(A) are relevant. [p. 44]

Statement of the Case

Reference to pages of the Joint Appendix in the proceeding below are designated by "JA". Reference to the briefs joined by all petitioners, except CPT, are designated as "Joint Petitioners or "JP".

Affidavits submitted and lodged with the Court:

A. During the proceedings below affidavits of the following parties in the Citizens petition were submitted or referenced (page nos. are of pages in copies of affidavits lodged with the Court:

CPT members Frank Goodrich of Texas (21), Marija Hughes of Washington D.C. (39) in exhibit of April 19, 1998 CPT motion for partial stay. Janet Newton (4), Dale Newton (5) Roger Knolton (6) and Lorinda Knolton (7) of Vermont, in April 29, 1998 Comments supporting motion for partial stay

B. Sixteen additional affidavits indicating they are members of CPT were submitted in a CPT April 19, 1998 motion for partial stay and include persons from the following States: Vivian Ferguson (18) and Eldfrid Bowron (20) of Washington; Muriel Anrow (28), Martha Winsten (30), Arthur Firstenberg (11), June Reiber (66) and Janet Ostrowski (90A) of New York; Charles Mainville (32) of Maine; Hal Rudnianin (34) and Alison Rall (37) of Michigan; Derek Bishop (35) of Hawaii; Alice Beougher (41) of Ohio; Lucinda Grant (54) and Susan Malloy (87) of Arizona; and Regina Siberski (68) and Kathleen P. Hawk (73) of Pennsylvania.

These show harms for which relief will be provided by a favorable ruling. See examples at p.57-8. The symp-

toms in many of these affidavits are similar to those EPA described (and was reported in the proceeding below.) EPA noted that complaints of symptoms attributed to RF exposure such as nausea, headaches, dizziness, pain in the eyes, ringing of ears, screeching and sizzling sounds, and irregular heartbeat are described collectively by the term "electrosensitivity." [JA 5538-39], JP Reply at 39. Also filed is affidavit of Michael C. Worsham, regarding its mention in JP principal brief of May 22,1998, and affidavit of D. Fichtenberg regarding its mention in JP Reply brief of July 27, 1998. His supplementary affidavit that I requested is at p.58.

Statement of case regarding Question #2:

Whether the Federal Communications Commission ("FCC") lawfully reversed previous requirement that radio frequency (RF) radiation from its facilities be as low as reasonably achievable, considering 47 USC 324 requirements that radio stations use minimum power necessary for the desired communications?

Keeping exposure as low as reasonably achievable is referenced in a petition for reconsideration to FCC of Ad-Hoc Association and other parties in the Joint Appendix ("JA") of the proceeding below at JA 0892 and in ex parte comments at JA 1359-62, at JP brief at 31. 47 USC 324 requires that radio stations shall use the minimum amount of power necessary to carry out the communications desired. (see text at David Fichtenberg (DF) petition at 21, and JP brief at 33.)

Judicial history:

1926 Attorney General Opinion:

The Attorney General issued an opinion regarding Regulation 14 of former Sec. 54 of Title 47, "the Secretary of

Commerce was not given power to determine in advance what this minimum amount should be for every case, and therefore he had no authority to insert such a determination as a part of any license." [1926, 35 Op.Atty.Gen. 126]

The Harvit et al. case:

The case of *Harvit Broadcasting Corp.* et al. is reported in Notice FCC 75R-344 reported in FCC Reports, 55 F.C.C. 2d 298, adopted August 21, 1975, Released September 17, 1975. In *Harvit* the Administrative Law Judge William Jensen concluded that applications by two broadcast companies should be denied, per 47 USC 324, in part because they were using excessive power for their coverage area. FCC overturned Judge Jensen's decision. FCC reversed the decision and reported,

"We agree with the Broadcast Bureau that the minimum power requirement of Section 324 was taken into consideration by the Commission at the time it established its Table of FM Channel. Assignments pursuant to Sections 303 and 307(b) and that these assignments [section references omitted] were designed to insure the fair, efficient, and equitable distribution of radio service among the several States and communities. To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [*Harvit* Id. 300]

FCC previous rules included keeping RF exposure as low as reasonably achievable

Joint Petitioners [JP Reply at 14] noted the relevant section of the previous FCC RF standard which states,

"Because of the limitations of the biological effects data base, these guides are offered as upper limits of exposure, particularly for the population at large. Where exposure conditions are not precisely known

> or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable.' [ANSI C95.1-1982, Section 5. Explanation, page 11. Document lodged with the Court by petitioner D. Fichtenberg, Docket 00-0407].

The Second Circuit Opinion notes that the previous FCC RF guidelines were those of ANSI C95.1-1982. [A11-A12].

FCC issued its OST bulletin No. 65, to explain to its licensees how they can comply with the FCC adopted ANSI RF standards. It was released in October 1985. In its section "ANSI Protection Guides for Exposure to RF Radiation" describing the ANSI 1982 requirements, FCC explicitly notes the above paragraph and states,

"Because of 'limitations in the biological effects data base," ANSI stated that 'these guides are offered as upper limits of exposure, particularly for the population at large.' ANSI further advised that, '[w]here exposure conditions are not precisely known or controlled, exposure reduction should be accomplished by reliable means to values as low as reasonably achievable." [see OST Bulletin No. 65, p. 5-6, lodged with the Court with D.Fichtenberg Petition #00-0407].

Statement of case regarding Question #4:

Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter, when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the factual comments in the filed petitions pertaining to this question, there are addition facts that

pertain to the RF expertise of the federal health agencies during the time period of the FCC rule making. These facts indicate that even the 'expert' agencies did not have the knowledge to advise what RF limits should be for conditions of chronic exposure to RF.

In 1993 FDA wrote the FCC with regard to its proposed RF standard, IEEE C95.1-1991 (ANSI C95.1-1992). FDA said,

"With respect to the specific levels cited in the standard for Maximum Permissible Exposures and SARs. CDRH has in the past expressed concern about the 1992 guidelines. The standard, as written, lacks a full explanation of its basis. In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by the standard. For example, very few research studies of long-term, low-level exposures of animals were included in the standard, despite the existence of studies that suggest an association of cancer development. Other studies have been published since finalization of the standard that strengthen this concern.

In addition, there have been insufficient studies of the health of humans who have been exposed to RF for several years or more. Although the current state of scientific knowledge does not enable us to offer a specific alternative to the exposure levels in the new standard, we do not believe this standard addresses the issue of long-term, chronic exposures to RF fields. (emphasis added).

[Letter of November 10, 1993, from Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health (CDRH) to Mr. Thomas P. Stanley of FCC. Letter in Joint Appendix of proceeding below at JA 0450-0451].

Similarly, in its 1996 letter to FCC, FDA reminded the FCC of its 1993 comments and stated,

"We also stated that we did not believe that C95.1-

> 1992 addresses the issue of long-term, chronic exposures to RF fields, and that the relevance of such questions would only increase as the use of portable and hand-held devices grows." [July 17, 1996 letter of E.D. Jacobson to FCC, at Second Circuit Joint Appendix 0616.]

Likewise, at a March 21, 1995 meeting with FCC, EPA outlined its plans for issuing RF guidelines. There it indicated that its first guidelines would be "Interim" and would "not include modulation, chronic exposure, nonthermal effects," [JA 0564, JA 0567] and that this would be addressed in a subsequent 'phase 2' EPA "final" exposure guideline. [JA 0566].

Consistent with the above, the Court of Appeals noted,

> "the parties do not dispute that RF radiation at excessive levels has thermal effects and that the ANSI and NCRP standards and thus the [FCC] Guidelines are premised on such effects." [A8]

Thus, the federal health agencies did not view the FCC RF guidelines as addressing the chronic exposure situation.

Facts on how FCC exercised its delegated authority relative to advice from federal health agencies on 2 key questions:

- **(a) What should be the RF exposure limits in public thoroughfares (sidewalks, parks, bus stops, etc.)?**

- **(b) When should cellular phone and other manufacturers of hand-held wireless phones be able to avoid evaluating if their products exceed safety limits?**

Whether FCC properly exercised its delegated authority may arguably be considered by considering facts on the extent FCC deferred to advice from the federal health agencies on the 2 key questions above. In its Brief FCC informed the

Second Circuit "shortly before the RF Order was issued, the FCC contacted each of the agencies, outlined the planned response to their comments, and solicited further input."[FCC Brief at 18] and then gave details [FCC Br. 18]. A close examination shows that the "planned response" was significantly changed when the final order was issued. Here are the specifics.

On July 1, 1996, FCC Chairman Reed Hunt sent a communication to EPA describing its proposed rules [see p.69 and JA 0614]. On July 2, 1996 Mr. Richard Smith, Chief of FCC Office of Engineering and Technology sent a similar letter to FDA [see p.72 and JA 616]. In both of these communications FCC staff indicated they proposed an approach that generally incorporated elements from both ANSI/IEEE and NCRP, and included:

1) "adoption of limits for field strength and power density limits based on *NCRP recommendations;"*

* * *

3) "deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible *future* consideration of a modified version.;"
[This means that FCC says it will defer adopting a provision that would allow manufacturers of certain 'low power' cellular phones or other devices to exclude themselves from having to evaluate if a particular product design could result in exceeding the FCC RF safety limits.] [emphasis added]

Subsequently, Arthur Firstenberg, who is President of petitioner Cellular Phone Taskforce, noticed that the actual text of the draft proposal to which FCC referred in its above

letters to EPA and FDA and to which the federal health agencies responded did not appear in the public record. Under a Freedom of Information Act (FOIA) request, he asked FCC for a copy of this draft proposal and FCC refused this request [see CPT Reply brief at 25-26, and its addendum B40-44 for A.Firstenberg's FOIA request and B45-47 for FCC's reason for refusal. Also see FCC refusal letter herein at p.80-83, especially see underlined text at p.83.]

In FCC's discussion of its refusal to release the document to which the federal health agencies responded, FCC said,

"The Report & Order [First Order] that was eventually adopted may differ in some respects from the document in question because it incorporates comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC [Interdepartment Radiation Advisory Committee] consultative process." [CPT Reply, addendum B-47, and herein at p.83]

What FCC First Order (Report & Order) actually provided regarding 1) and 3) above:

Facts regarding adoption of NCRP limits for field strength and power density [point 1)]:

When FCC released its First Order [notice FCC96-326] on August 1, 1996, it stated, "Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3. [footnote 1 to par.#1, First Order p. 1, JA 0629 and at p.84]

NCRP RF radiation limits for field strength and power density limits in NCRP 17.4.3 provide that the more restric-

tive general population exposure limits are also to apply to public thoroughfares [through which the public passes in transit] and is to be based upon a persons average exposure over a 30 minute period. Specifically, this section notes:

> "At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM [radiofrequency electromagnetic] sources, and brief exposure to civil telecommunications." [see 17.4.3 at p.79 and JA 0307] [emphasis added]

In its First Order, FCC ruled regarding RF exposure limit guidelines in public thoroughfares:

> "Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits [which are 1/5th of occupational/controlled limits], as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means." [par. #43 Notice FCC 96-326, at p. 75 and JA 0644].
>
> The above policy ruling was also incorporated into Note 1 to Table 1 of 47 CFR 1.1310 (at p.75 and JA 0721)]

Facts about FCC's First Order regarding FCC deferring adoption of provisions allowing manufacturers to not evaluate if their cellular phone designs result in RF exposure exceeding safety limits [point 3)]

FCC reported that FDA indicated that an appropriate radiated power exclusion level for ensuring that the limit for the public of RF exposure to the head under 'worst case' conditions would be on the order of 180 mW at 900 MHz., where 'mW' is milliwatts of power - a milliwatt is 1/1000th of a

watt. [par. 71, FCC 96-326 (at p.75 and JA0655)].

This means that FDA said that if the amount of output power of a cellular or other hand-held phone is more than about 180 milliwatts of power, then under 'worst case' conditions there is a risk that the head of a user would absorb RF amounts above the safety limits.

FCC said it studied RF exposure from six cellular phone models operating near 900 MHz based on a "standard" operating situation for the position of the phone relative to the head. Based on such study, FCC established for such cellular phones a radiated power exclusion clause that permits manufacturers of cellular phones with less than 570 mW of output power from having to evaluate if their product may result in RF exposure that exceeds safety limits. [see par. 72, 73 FCC 96-326, [at p.76-77 and JA 0655-56].

Reasons For Granting the Petition

Summary of Argument

Pertaining to Question #2:

FCC interpretation of 47 USC 324 is that it requires FCC to establish maximum limits on power, taking 47 USC

324 into account. But this is the opposite of what Congress intended. 47 USC 324's plain sense is that within the maximum power limits FCC may set, each station, on a case by case basis, needs to take steps so that only minimum power necessary is used.

Pertaining to Question #4:

FCC and the federal health agencies acknowledged that they do not have expert knowledge on RF health effects due to chronic exposure, but admit there is evidence of adverse effects - and so could not properly consider this important factor. Hence, there is no proper authority to preempt.

Pertaining to Question #5:

Additional points not in other petitions on why FCC cannot preempt RF regulations to protect health:

- 47 U.S.C. 332(c)(3)(A) supports local regulation
- History of preemption section shows that Senate did not agree with House. Language changes all support that the Senate would not agree to preempt local health regulations.
- The syntax of the preemption, by specifying the condition that local RF regulation must be on the basis of 'environmental effects' implies there are other conditions (health) when preemption is not allowed.

Pertaining to Question #6:

If a local jurisdiction or State abandons regulation of zoning and permitting cellular phone and other personal wireless services facilities, then it would not be immune from likely tort liability suits – since there is no reasonable cause for such abandonment. This risk to liability distinguishes the FCC RF exposure preemption from other seemingly similar preemption cases. The result is the 'choice' between being forced to risk liability or to run the federal FCC RF exposure

program. This is (de facto) commandeering as described in New York v. United States, 505 U.S. 144 (1992)

Argument

Question #2: Whether the Federal Communications Commission ("FCC") lawfully declined to continue its previous requirement that microwave/radio frequency (RF) radiation exposure from its facilities be as low as reasonably achievable and considering 47 USC 324 requirement that radio stations use minimum power necessary for the desired communications?

In formulating 47 USC 324 Congress clearly is not seeking an energy conservation program per se. Rather Congress is trying to minimize any known or suspected adverse effects of radio frequency radiation - which at the time the statute was established was radio frequency interference.

Recall that in *Harvit,* FCC states its maximum power limits 'satisfy' 47 USC 324. FCC claims that,

> "To hold otherwise is to assume that the Commission acted in violation of Section 324 when the FM Assignment Table was established." [Harvit Id. 300]

This makes no sense. FCC sets maximum power limits based on wanting to prevent interference between its licensees and, according to FCC, it also considers the maximum power its licensees may need to cover their desired broadcast area. If we interpret 47 USC 324 literally, as did the opinion

at 1926, 35 Op.Atty.Gen. 126, then this statue simply says that in addition to staying within the maximum power output limits set by FCC, each station must examine its particular circumstances to strive to use minimum power.

This interpretation does not render FCC tables of maximum allowed power a violation of 47 USC 324 as FCC claims. On the contrary, it means what FCC intended to emphasize to its licensees in its OST Bulletin No. 65, page 5-6 (see p.12). Namely, that even though maximum FCC power limits are not exceeded, still licensees are to take steps to minimize the RF power to which populations may be exposed in order for licensees to reach their broadcast areas.

A purpose of the Telecommunications Act of 1996 was to secure "higher quality services for American consumers." Minimizing the RF power to which cellular phone users and the public are exposed as provided in the FCC's previous RF guidelines is one important aspect of providing such services.

Thus, there appear two ways that 47 USC 324 is interpreted. FCC says that the statute's "minimum power" requirement is met as long as FCC's "maximum power" limits are met. With due respect, it is suggested that this FCC interpretation is far from the plain meaning and in no way can be interpreted as what Congress intended. 'Maximum allowed power' is just not the same as 'minimum power necessary' without exceeding maximum limits. Minimum power needed must be determined on a case by case basis, and cannot be set in advance, as can FCC maximum limits.

When Congress told FCC to finish its rule making in ET-Docket 93-63 [Telecom. Act of 1996, sec. 704(c)] it did not authorize FCC to exceed its authority and violate federal stat-

ute, such as 47 USC 324. Therefore, whatever RF guidelines FCC might propose, they cannot conflict with 47 USC 324 as understood according to the U.S. Attorney General view at 1926, 35 Op.Atty.Gen. 126, at p.10-11]

.

Also, as noted above, FCC did not give any documentation or specifics about its methods or results when it stated seeking a "proper balance" between the needs of public health and efficient telecommunications services was the reason it did not adopt the "as low as reasonably achievable" policy (reversing its previous policy in ANSI 1982, noted above) – and such reversal appearing in conflict with the policy of Congress as given in 47 U.S.C. 324 described above.

This court has ruled, "[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicles Manufacturers Assn. v. State Farm Mutual, 463 U.S.* 29,42].

Whether the understanding of the FCC or the view of the Attorney General above is followed in the build-up of the wireless technology revolution can have a great impact. This can effect how this build-up occurs, what types of base station transmission facilities are developed, what types of cellular phones are designed, and how extensively the population is exposed to RF beyond what is as low as reasonably achievable.

For this reason it is very important for the Court to decide to consider hearing Question #2 above and deciding what 47 USC 324 requires.

Question #4: Whether an agency may have delegated authority to preempt state or local public health regulations on a matter when that agency does not have expertise in that matter or when expertise is otherwise lacking, or when the preemption delegation lacks a standard?

In addition to the comments already submitted on the above question, consider the following. The CPT petition, #00-0427, notes that the case J.W. Hampton, Jr. and Co. v. United States, 276 U.S. 394 was recently referenced in Mistretta v. United States, 488 U.S. 361, 371-372. In Hampton, J.. and Co. is noted regarding preemption authority that,

"If such a power is to be exercised at all, it can be only satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject." Hampton Jr. and Co. 276 U.S. at 406 quoting State ex rel. Railroad and Warehouse Comm'n v. Chicago, M. and St. P. R. Co., 38 Minn. 281, 301, 37 N.W. 782 (1888).

Also, this Court ruled,

> "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' [In *Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 43 (1983) citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)]

Pertaining to this standard of review, note that from the Statement of the Case for this question it is clear both EPA

and FDA acknowledge that: (1) evidence of adverse health exists below the hazard threshold upon which the FCC standard is based, (2) the FCC standard does not address the issue of chronic exposure, and (3) that these agencies do not have sufficient information to advise on what specific maximum limits should be to protect from chronic RF exposure.

Thus, based on *Motor Vehicles* above, to preempt in an area means there is sufficient knowledge about the subject to know how to decide, so important factors can be properly considered. So it seems that the only 'regulation' FCC can properly adopt when needed information is lacking to rule that local jurisdictions may set their own criteria as long as it is based upon bona fide scientific studies and public health considerations.

FCC may not argue it rules rely on the delegated authority of the federal health agencies – for there is no rational connection between FCC assertions its rules have the support of the federal health agencies and the facts in the record.

FCC justified its rules claiming these rules had the support of the federal health agencies. As noted at p.13-14, whatever support these agencies did give, they emphasized that the new FCC rules did not rely on knowledge of the long-term chronic exposure health effects of RF radiation. (see discussion above).

Moreover, it was noted at p.14-18 that perhaps two of the most important questions are:

(a) "What should be the RF exposure level in public places?"

(b) "When should manufacturers be excused from evaluating if their cellular or other hand-held phone products cause RF exposure limits to be exceed?

As shown at p.14-18, for both of these questions, FCC did not follow what it proposed to the federal health agencies in its draft. Instead of using the more stringent NCRP 17.4.3 [at p.79] 'general population limits to apply to public thoroughfares, FCC uses limits for occupational/controlled exposure that are 500% of these general population RF limits that FCC proposed to the federal health agencies to apply to public thoroughfares.

Similarly, FCC excludes from evaluation of compliance with the safety limits cellular phones (900 MHz) even though it told the federal health agencies it would defer such action regarding any type of hand-held phone. Moreover, it allows exclusion from such evaluation phones with output power up to 580 milliwatts [#72-73 at p.76-77]– which is more than 300% of what FCC said was the output power above which under worst case conditions RF exposure can exceed safety limits [#71, at p.75-76].

These two differences between what FCC proposed and what it did are not 'minor points'. Rather they are amongst the most significant points of the entire rule making. If the FCC rules are allowed to stand, then RF exposure limits will be 500% of what FCC proposed to the federal health agencies to apply to the nation's public thoroughfares (side walks, parks, beaches, bus stops, etc.) This is a major public

health issue and alone deserving of this Court reviewing whether FCC exercised proper delegated authority.

What other proposal reverses occurred between the FCC staff recommendations and what the FCC did we may never know – since FCC will not reveal the document to which agencies responded.

Therefore, FCC cannot say its guidelines have the support of the federal health agencies with delegated authority on RF health issues since neither the Court nor the public know what was in the document to which the federal health agencies responded. This Court ruled, "the agency must examine the relevant data and articulate a satisfactory explanation for its actions including a 'rational connection between the facts found and choice made.' " [Motor Vehicles Id. 43 [citations therein omitted].

Rule 10 says when a Court departs far from accepted judicial procedure, then supervision may be needed. Here the Second Circuit is not troubled that incessant FCC claims of health agency support rest on a document FCC keeps secret and admits may not reflect the final rule (p.83). Allowing this practice greatly threatens democratic process. Moreover wireless technology is sweeping the nation and the health of 100s of millions of people can be affected. These considerations justify the Court's attention. The Court need NOT decide if FCC 'flipped' on what it proposed, but only that important FCC conclusions of health agency support cannot stand when support is based on a secret document, so the rule making is unlawful. [since even FCC admits there could have been changes after the draft was seen by the health agencies [p.83]

Question 5. Whether FCC may imply "environmental effects" in 47 USC 332(c)(7)(B)(iv) includes "health effects", since PL 104-104 sec. 601 prohibits implied preemption

and sec. 253(b) provides for States protecting public safety?

In addition to the argument in petitions of Worsham and Fichtenberg, consider the following:

1. Local regulation to protect health is within the permitted by the provisions of 42 USC 332(c)(3)(A) [at p.44] regarding the "other terms and conditions" local jurisdictions can regulate. The Committee report explicitly mentions zoning authority is retained without any restrictions [p.46]. Therefore, Congress has explicitly granted authority to regulate RF radiation to protect health, and unless it later explicitly limited such authority, FCC is powerless to exceed its authority and preempt what Congress has said is off limits to FCC. Thus, while Congress certainly permitted FCC to regulate the operations of its licensees bar local jurisdictions for also doing likewise, particularly regarding zoning authority and to protect health.

2. In the same section 47 USC 332, are the different terms 'safety of life' [47 USC 332(a) at p.44] and the contested "environmental effects" in 332(c)(7)(B)(iv). Different terms mean different things. Accordingly, the preemption pertaining to 'environmental effects' does not pertain to local regulations to protect safety of life, including regulation to protect the public health from RF radiation from FCC licensed facilities.

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) definitions define "environment" without any reference to health (p. 37).

4. The legislative history favors preventing such FCC preemption. While HR 1555 and its Committee report strongly supports the FCC position, the Joint Conference report does not. Because:
   (a) The Senate version of the Bill did not even include a

zoning preemption section as did the House. This suggests the Senate did not accept the findings of the House of Representatives.[p.47-49, p.51]

(b) Mention in HR 1555 Committee Report of the need for "uniform, consistent requirements with adequate safeguards of the public health and safety" are completely removed from the final Joint report.

(c) The Joint version removes entirely any direction to FCC about protecting health [p.55] and refers only to 'environment.' Congress is expected to provide direction when it issues a preemption., especially to protect the public health. Accordingly, if Congress intended to preempt health, one is hard-pressed to explain why Congress would remove direction for such preemption (although arguably inadequate) from the House Committee report. Similarly, if the Joint Committee [p.53-56] intended to preempt local RF radiation public health and safety regulations it would not have removed language already in the House Committee report explaining this was intended.

5. 47 USC 253(b) [at p.40] explicitly provides for States being able to regulate to protect the "public safety and welfare" even if it may cause a 'barrier to entry.' As a separate basis for State authority the section also authorizes States to "safe guard the rights of consumers;" The Committee text chooses to explain only what such safeguarding may includes. So this was all that was thought in need of clarification. Just because it was not commented upon, it is still a valid State authorization.

6. Both previous and present FCC regulations set no compli ance requirements for staying within its RF limit guide lines – other than to submit an "Environmental Asses sment" if limits are exceeded. It is very challenging to believe that Congress intended local RF public health

compliance limits to be replaced by a the requirement merely that an operator must submit some "Environmental Assessment" when his facilities exceed FCC RF guidelines.

See par. #4 of NPRM, JA 0376 showing this FCC policy was in effect at least from 1985 and continuing in effect when the preemption statute became law. In its First Order (Report & Order) FCC acknowledges, "As was true for the previous rules, there are no specific compliance requirements as such." [Appendix A, Final Regulatory Flexibility Analysis, Sec.IV. subsection: Other compliance requirements, at p.78, JA 705]

Here FCC argues that the requirement to do an EA is a "de facto compliance requirement" in order "to avoid the preparation of a costly and time-consuming EA." But FCC provides no data for such a conclusion, and admits there is little data since "EAs are rarely filed." Indeed, FCC needs to explain why it disbelieves that the more likely scenario are computer generated reports run off a 'paper-mill' requiring almost no time or cost.

7. The 'conditional phrasing' of the syntax of the preemption statute argues against the FCC and Second Circuit interpretation.

The statute does not say that under all circumstances are local jurisdiction regulations of RF to be preempted if they are more stringent than those of the FCC. Rather, only if they are based "on the environmental effects" of RF radiation. Thus, the very syntax implies there are conditions for which local jurisdiction regulation of RF may not be preempted. What else could this be but to protect the public health?

Question #6: Whether Congress in 47 U.S.C. 332(c)(7)(B)(iv), by preempting local jurisdictions from regulating RF radiation, gave jurisdictions 'no choice' but to implement

FCC rules, or to be compelled if they refused, has de facto commandeered states or local jurisdictions to run a federal program, in violation of the 10th amendment?

In addition to the comments in submitted petitions on this question,, consider the following amplification on the comment in petition #00-407 that,

> "Since such dangers of risk to property are so obvious and there is no benefit to the community by so abandoning [regulation of personal wireless services facilities], that any jurisdiction that reverses its present course of zoning and permitting such facilities puts itself at liability risk." [at p. 36 of #00-047].

The Court has noted,

"For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters [policy making decisions] would be an infringement upon the powers properly vested in a coordinate co-equal branch of government. [*Owen v. City of Independence*, 445 U.S. 622, 648 (1980)] Citing *Johnson v. State*, 69 Cal. 2d 782, 794, n.8 447 P.2d 352, 361 n.8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government.").

The Court continues,

"In order to ensure against any invasion into the legitimate sphere of the municipality's policy making process, courts have therefore refused to entertain suits against the city for "either the non-exercise of, or for the manner in which in good faith it exercises, discretionary powers of a public or legislative character." *Owen* Id. 648 and citations therein.

But one question is how "in good faith" could a local jurisdiction reverse its requiring personal wireless services facilities to be subject to zoning and permitting regulations?

The Supreme Court has stated,
"Revocation constitutes a reversal of the agency's former views as to the proper course. * * * Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." [*Motor Vehicle Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 42.]

While the above was applied to federal agencies, the same reasoning applies to a test of "in good faith" should a local jurisdiction abandon zoning and permitting of cellular towers and other personal wireless services facilities. What good reason could a jurisdiction give to demonstrate 'in good faith'?

Abandonment would subject the public and businesses to risk of damage to property and life and damage to the characteristics of neighborhoods. In *Petersburg Cellular Partnership v. Board of Supervisors of Nottoway County*, 205 F.3d 688, 703 (4th Cir. 2000) Fourth Circuit Judge Niemeyer notes some of these obvious disastrous consequences.

Could the local jurisdiction claim it wanted to avoid approving facilities based on FCC guidelines? No. It makes no sense. By abandoning the field with no federal program to take its place, the City is giving its implicit approval for any cellular phone tower or other personal wireless services facility to be built any way any where.

Could the local jurisdiction claim it would let a fed-

eral program license such facilities and so let the federal program feel the brunt of public displeasure? No. Because it is the local jurisdiction that will face any liability and other consequences of such abandonment, given there is no federal zoning and permitting program. Thus the essential "in good faith" test that provides local jurisdiction immunity would fail.

Accordingly, "The innocent individual who is harmed by an abuse of government authority is assured that he will be compensated for his injury." *Owen* Id. 657. Since no rational reason could be given for a local jurisdiction to abandon the above zoning and permitting, with no suitable federal program to take its place, there are good grounds to believe that such abandonment would be considered an abuse of government authority.

In Owen, the Court also noted, "[B]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality in its charter or by statute, the State had impliedly withdrawn city's immunity from liability for nonperformance or misperformance of its obligation." *Owen* Id. at 646 with citations therein.

If the Court will grant hearing this question, then numerous examples of State law requiring its local jurisdictions to act to protect property from damage will be cited. Since there is no rational basis a local jurisdiction could offer for abandoning cellular tower zoning and permitting when there is no federal program suitable to take its place, as noted above, local jurisdictions subject to such State requirements will be liable for damages to property due to such abandonment.

The Court also noted that under 42 USC 1983, relief from deprivation of 14th amendment rights might be brought to a federal court, that "a municipality can be li-

able under1983 only where its policies are the "moving force [behind] the constitutional violation." [*Canton v. Harris*, 489 U.S. 378, 389 (1989) (with citations therein).

The Court continued, "Only where a municipalities failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under 1983." *Canton* Id. at 389. It is blatantly obvious what the adverse impacts would by on endangering lives and property should a municipality abandon zoning and permitting of cellular phone towers when there is an absence of a suitable federal program to take its place, as Judge Niemeyer notes above. Hence, such abandonment would subject the jurisdiction to liability risk.

For the above reasons, the choice of abandonment is a choice to take on significant liability risk. This 'choice' to accept a liability risk was found in *New York v. United States*, 505 U.S. 144 (1992) to be a commandeering of state or local government and thus unconstitutional.

> "Because an instruction to state governments to take title to waste standing alone, would be beyond the authority of Congress, and because a direct order to regulate, standing alone, would also be beyond the authority of Congress, it follows that Congress lacks the power to offer the States a choice between the two." *New York* Id. at 505 U.S. 144, 176.

Since the 'choice' of abandonment results in damage and liability risk it is no real choice, and for reasons the same as New York (regulate or accept liability) the preemption is de facto commandeering of state or local government.

The above provides important characteristics of this preemption that distinguishes it from other related Supreme Court cases. For example in *Hodel v. Virginia Surface Mining & Reclamation Association,* 452 U.S. 264, the Court held there was no commandeering and valid preemption in part because "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government." *Hodel* Id. at 288.

However, in our case, if local jurisdictions abandoned zoning and permitting of cellular phone towers and other personal wireless services facilities there is no suitable federal program to take its place.

In *Federal Energy Regulatory Commission (FERC) v. Missippi,* 456 U.S. 742, the Court did entertain the option that the choice put to the States – that of either abandoning regulation of the field altogether or considering federal standards – may be a difficult one. And that is particularly true when Congress, as is the case here, has failed to provide an alternative regulatory mechanism. " [*FERC* Id. at 766].

However, in the case of *FERC*, abandonment of a state utility regulatory authority would not lead to the chaos and risk to loss of life and property were cellular phone tower zoning abandoned. Nor would it put the state or local jurisdiction at likely liability risk. Rather, abandonment could merely affect utility rates, procedures for hearing complaints, and related utility matters and which occurred already for existing unregulated utilities.

Similarly, in *Garcia v. San Antonio*, 460 U.S. 528, if the San Antonio Metropolitan Transit Authority abandoned the field of transit services, it may likely cause

transit difficulties for the public and business. However, these difficulties would not put the authority at liability risk, as would the abandonment required to avoid regulating according to the FCC RF exposure preemption.

Therefore for the above reasons, while FCC in its brief before the Second Circuit used *Hodel, FERC* and *Garcia* to justify the constitutionality of its preemption [FCC Brief at 41-43] its reliance on these cases is misplaced. Similarly, Judge King in Petersburg Cellular gives arguments similar to those of the FCC and which are likewise misplaced. The test is not whether a local jurisdiction function is 'traditional' or not – which *Garcia* said was no longer a helpful criteria. Rather a proper test criteria is whether by abandoning a critical local jurisdiction function when there is no suitable federal program to take its place, the local jurisdiction puts itself at liability risk or otherwise must face not a difficult choice, but an 'impossible' choice.

For example, suppose the section of the Brady gun control act found unconstitutional in *Printz v. United States*, 521 U.S. 898 (1997) was crafted in an alternative form to appear as a conditional preemption, similar to the language in FERC. That is, suppose just like FERC stated that 'if there is a state utility authority' it must do certain things, suppose a hypothetical Brady gun control act said 'if a local jurisdiction has a chief law enforcement officer ("CLEO"), then the local jurisdiction must require the CLEO to do certain things. Like FERC, would the Court say, "Nothing requires the local jurisdiction to act as provided. It has the choice – although 'a difficult one' of abandoning the field of law enforcement"? Abandoning state utility regulation is a possible choice, but abandoning law enforcement is not.

The 'choice' of abandoning law enforcement would cause such chaos and loss of life and property, and put the jurisdiction at liability risks, is an impossible choice. Likely the

Court would find it so and rule that this hypothetical reformulation of the unconstitutional Brady gun control provision is de facto commandeering and still unconstitutional regardless of the guise in which it is worded.

In a similar manner the FCC preemption in this case also presents an impossible choice of abandonment. The FCC preemption that provides the forced choice of accepting liability (or other impossible choice) or regulate according to the federal program – becomes 'de facto' commandeering based on the principles in *New York* above, and is unconstitutional.

Conclusion

For the above additional reasons a writ of certiorari should be granted for the supported petitions.

Respectfully submitted,

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Appendix B

40 CFR § 302.3 Definitions.

As used in this part, all terms shall have the meaning set forth below:

The Act, CERCLA, or Superfund means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

Administrator means the Administrator of the United States Environmental Protection Agency (``EPA''); Consumer product shall have the meaning stated in 15 U.S.C. 2052;

Environment means (1) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (2) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient 304air within the United States or under the jurisdiction of the United States;

42 USC Sec. 1983

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken

in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

47 U.S.C. Sec. 253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to

require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public
rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for
designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply--

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 253--REMOVAL OF BARRIERS TO ENTRY

Senate bill

Section 20(a) adds a new section 254 to the Communications Act and is intended to remove all barriers to entry in the provision of telecommunications services.

Subsection (a) of new section 254 preempts any State and local statutes and regulations, or other State and local legal requirements, that may prohibit or have the effect of prohibiting any entity from providing interstate or intrastate telecommunications services.

Subsection (b) of section 254 preserves a State's authority to impose, on a competitively neutral basis and consistent with universal service provisions, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. States may not exercise this authority in a way that has the effect of imposing entry barriers or other prohibitions preempted by new section 254(a).

Subsection (c) of new section 254 provides that nothing in new section 254 affects the authority of States or local governments to manage the public rights-of-way or to require, on a competitively neutral and nondiscriminatory basis, fair and reasonable compensation for the use of public rights-of-way, on a nondiscriminatory basis, provided any compensation re-

quired is publicly disclosed.

Subsection (d) requires the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any State or local statutes, regulations or legal requirements that violate or are inconsistent with the prohibition on entry barriers contained in subsections (a) or (b) of section 254.

Subsection (e) of new section 254 simply clarifies that new section 254 does not affect the application of section 332(c)(3) of the Communications Act to CMS providers.

Section 309 adds a new section 263 to the Communications Act and is intended to permit States to adopt certain statutes or regulations regarding the provision of service by competing telecommunications carriers in rural markets. Such statutes or regulations may be no more restrictive than the criteria set forth in section 309. The Commission is authorized to preempt any State statute or regulation that is inconsistent with the Commission's regulations implementing this section.

House amendment

The House provisions are identical or similar to subsections 254(a), (b) and (c). The House amendment does not have a similar provision (d) requiring the Commission to preempt State or local barriers to entry, if it makes a determination that they have been erected.

Conference agreement

The conference agreement adopts the Senate provisions.

New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of elec-

tric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive utility ratepayers from the potential harms caused by such activities are not preempted under this section. However, explicit prohibitions on entry by a utility into telecommunications are preempted under this section.

The rural markets provision in section 309 of the Senate bill is simplified and moved to this section. The modification clarifies that, without violating the prohibition on barriers to entry, a State may require a competitor seeking to provide service in a rural market to meet the requirements for designation as an eligible telecommunications carrier. That is, the State may require the competitor to offer service and advertise throughout the service area served by a rural telephone company. The provision would not apply if the rural telephone company has obtained an exemption, suspension, or modification under new section 251(f) that effectively prevents a competitor from meeting the eligible telecommunications carrier requirements. In addition, the
provision would not apply to providers of CMS.

47 U.S.C. Sec. 309. Application for license

[In 1993 Pub. L. 103-66, Sec. 6002(a), added subsec. (j).]

(j) Use of competitive bidding

Subsec. (j). Pub. L. 103-66, Sec. 6002(a), added subsec. (j).

(3) Design of systems of competitive bidding

For each class of licenses or permits that the Commission grants through the use of a competitive bidding system, the Commission

shall, by regulation, establish a competitive bidding methodology. The Commission shall seek to design and test multiple alternative methodologies under appropriate circumstances. The Commission shall, directly or by contract, provide for the design and conduct (for purposes of testing) of competitive bidding using a contingent combinatorial bidding system that permits prospective bidders to bid on combina-

tions or groups of licenses in a single bid and to enter multiple alternative bids within a single bidding round. In identifying classes of licenses and permits to be issued by competitive bidding, in specifying eligibility and other characteristics of such licenses and permits, and in designing the methodologies for use under this subsection, the Commission shall include safeguards to protect the public interest in the use of the spectrum and shall seek to promote the purposes specified in section 151 of this title and the following objectives:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum; and (E) ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed--

(i) before issuance of bidding rules, to permit notice and comment on proposed auction procedures; and

(ii) after issuance of bidding rules, to ensure that interested parties have a sufficient time to develop business plans, assess market conditions, and evaluate the availability of equipment for the relevant services.

47 USC Sec. 332. Mobile services
(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will--

(1) promote the safety of life and property;
(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and marketplace demands;
(3) encourage competition and provide services to the largest feasible number of users; or
(4) increase interservice sharing opportunities between private mobile services and other services.

47 USC 332(c) Regulatory treatment of mobile services
(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(1) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(2) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

House Report 103-111 of 103rd Congress, 1st Sess. 261 (1993). Comments on 47 U.S.C. 332(c)(3)(A)

It is the intent of the Committee that the States still would be able to regulate the terms and conditions of the services. By, 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under 'terms and conditions'.

Bill

House Bill HR 1555. SEC. 107. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) National Wireless Telecommunications Siting Policy.--Section 332(c) of the Act (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

``(7) Facilities siting policies.--(A) Within 180 days after enactment of this paragraph, the Commission shall prescribe and make effective a policy regarding State and local regulation of the placement, construction, modification, or operation of facilities for the provision of commercial mobile services.

``(B) Pursuant to subchapter III of chapter 5, title 5, United States Code, the Commission shall establish a negotiated rulemaking committee to negotiate and develop a proposed policy to comply with the requirements of this paragraph. Such committee shall include representatives from State and local governments, affected industries, and public safety agencies. In negotiating and developing such a policy, the committee shall take into account--

``(i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services;

``(ii) the legitimate interests of State and local governments in matters of exclusively local concern;

``(iii) the effect of State and local regulation of facilities siting on interstate commerce; and

``(iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities for the provision of commercial mobile services.

``(C) The policy prescribed pursuant to this paragraph shall ensure that--

``(i) regulation of the placement, construction, and modification of facilities for the provision of commercial mobile services by any State or local government or instrumentality thereof--

``(I) is reasonable, nondiscriminatory, and limited to the

minimum necessary to accomplish the State or local government's legitimate purposes; and

``(II) does not prohibit or have the effect of precluding any commercial mobile service; and

``(ii) a State or local government or instrumentality thereof shall act on any request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services within a reasonable period of time after the request is fully filed with such government or instrumentality; and

``(iii) any decision by a State or local government or instrumentality thereof to deny a request for authorization to locate, construct, modify, or operate facilities for the provision of commercial mobile services shall be in writing and shall be supported by substantial evidence contained in a written record.

``(D) The policy prescribed pursuant to this paragraph shall provide that no State or local government or any instrumentality thereof may regulate the placement, construction, modification, or operation of such facilities on the basis of the environmental effects of radio frequency emissions, to the extent that such facilities comply with the Commission's regulations concerning such emissions.

``(E) In accordance with subchapter III of chapter 5, title 5, United States Code, the Commission shall periodically establish a negotiated rulemaking committee to review the policy prescribed by the Commission under this paragraph and to recommend revisions to such policy.".

(b) Radio Frequency Emissions.--Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) Availability of Property.--Within 180 days of the enactment of this Act, the Commission shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for

the placement of new telecommunications facilities by duly licensed providers of telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable cost-based fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

House Committee Report 104-204, 104th Cong. 1st. Sess. Section 107. Facilities Siting; Radio Frequency Emission Standards

Section 107 provides that within 180 days of enactment, the Commission is to prescribe a national policy for the siting of commercial mobile radio services facilities. Representatives of affected industries, State and local governments and public safety agencies are to be included in the negotiation committee. It is the Committee's intent that the Commission establish a negotiated rulemaking committee authorized by the Negotiated Rulemaking Act of 1990 (subchapter III of chapter 5, Title 5 of the U.S. Code) comprised of representatives of State and local governments, public safety agencies and affected wireless telecommunications (Commercial Mobile Radio Service)
industries. The committee is to develop a uniform national policy for the siting of Commercial Mobile Radio Service (CMRS) facilities for antennas, cell sites and other infrastructure-related equipment necessary to provide efficient wireless telecommunications services to the public.

The committee's recommendations must ensure that (1) State and local regulation is reasonable, nondiscriminatory, and the minimum necessary and does not have the effect of precluding any commercial mobile service; (2) siting requests are acted upon within a reasonable period of time; and (3) denials of requests are issued in writing and supported by substantial evidence. The siting of facilities cannot be denied on the basis of Radio Frequency (RF) emission levels which are in compliance with Commission RF emission regulated levels. The Commission is to complete within 180 days its action on RF emission standards. The Federal Government, within 180 days after enactment, is to prescribe procedures to make available to wireless telecommunications providers property and rights-of-way under its control on a fair, reasonable and nondiscriminatory basis.

The Committee finds that current State and local
requirements, siting and zoning decisions by non-federal units

of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) as well as the rebuilding of a digital technology-based cellular telecommunications network. The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible. Such requirements will ensure an appropriate balance in policy and will speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range and options for such services.

The Committee recognizes that there are legitimate State and local concerns involved in regulating the siting of such facilities and believes the negotiated rulemaking committee should address those matters, such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way. The intent of the Committee is that requirements resulting from the negotiated rulemaking committee's work and subsequent Commission rulemaking will allow construction of a CMRS network at a lower cost for siting and construction compatible with legitimate public health, safety and property protections while fully addressing the legitimate concerns of all affected parties and providing certainty for planning and building.

The Committee has received substantial evidence that local zoning decisions, while responsive to local concern about the potential effects of radio frequency emission levels, are at times not supported by scientific and medical evidence. A high quality national wireless telecommunications network cannot exist if each of its component must meet different RF standards in each community. The Committee believes the Commission rulemaking on this issue (ET Docket 93-62) should contain adequate, appropriate and necessary levels of protection to the public, and needs to be completed expeditiously. No State or local government, solely on the basis of RF emissions, should block the construction of sites and fa-

cilities or installation of equipment which comply with the Commission RF standards. The Commission is directed to develop and issue procedures to make available to the maximum extent possible the use of Federal Government property, rights-of-ways, easements and any other physical instruments and appropriate assets that could be used as CMRS facilities sites that do not conflict with the intent of other Federal laws and regulations. The Committee recognizes, for example, that use of the Washington Monument, Yellowstone National Park or a pristine wildlife sanctuary, while perhaps prime sites for an antenna and other facilities, are not appropriate and use of them would be contrary to environmental, conservation, and public safety laws.

B17

TELECOMMUNICATIONS ACT OF 1996
Senate Conference Report No. 104-230, 104th Cong. 2d Sess. 704—Facilities siting, radio frequency emission standards

Senate bill :
No provision.

House amendment

Section 108 of the House amendment required the Commission to issue regulations within 180 days of enactment for siting of CMS. A negotiated rulemaking committee comprised of State and local governments, public safety agencies and the affected industries were to have attempted to develop a uniform policy to propose to the Commission for the siting of wireless tower sites.

The House amendment also required the Commission to complete its pending Radio Frequency (RF) emission exposure standards within 180 days of enactment. The siting of facilities could not be denied on the basis of RF emission levels for facilities that were in compliance with the Commission standard.

The House amendment also required that to the greatest extent possible the Federal government make available to use of Federal property, rights-of-way, easements and any other physical instruments in the siting of wireless telecommunications facilities.

Conference agreement

The conference agreement creates a new section 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances set forth in the conference agreement. The

conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other than under section 332(c)(7)(B)(iv) of the Communications Act of 1934 as amended by this Act and section 704 of the Telecommunications Act of 1996 the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or
modification of CMS facilities should be terminated.

When utilizing the term `functionally equivalent services' the conferees are referring only to personal wireless services as defined in this section that directly compete against one another. The intent of the conferees is to ensure that a State or local government does not in making a decision regarding the placement, construction and modification of facilities of personal wireless services described in this section unreasonably favor one competitor over another. The conferees also intend that the phrase `unreasonably discriminate among providers of functionally equivalent services' will provide localities with the flexibility to treat
facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services. For example, the conferees do not intend that if a State or local government grants a permit in a commercial district, it must also grant a permit for a competitor's 50-foot tower in a residential district.

Actions taken by State or local governments shall not prohibit or have the effect of prohibiting the placement, construction or modification of personal wireless services. It is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made on a case-by-case basis.

B19

Under subsection (c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision.

The phrase `substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions.

The conferees intend section 332(c)(7)(B)(iv) to prevent a State or local government or its instrumentalities from basing the regulation of the placement, construction or modification of CMS facilities directly or indirectly on the environmental effects of radio frequency emissions if those facilities comply with the Commission's regulations adopted pursuant to section 704(b) concerning such emissions.

The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunications, including the authority to regulate the construction, modification and operation of radio facilities.

The conferees intend that the court to which a party appeals a decision under section 332(c)(7)(B)(v) may be the Federal district court in which the facilities are located or a State court of competent jurisdiction, at the option of the party making the appeal, and that the courts act expeditiously in deciding such cases. The term `final action' of that new subparagraph means final administrative action at the State or local government level so that a party can commence action under

the subparagraph rather than waiting for the exhaustion of any independent State court remedy otherwise required.

With respect to the availability of Federal property for the use of wireless telecommunications infrastructure sites under section 704(c), the conferees generally adopt the House provisions, but substitute the President or his designee for the Commission.

It should be noted that the provisions relating to telecommunications facilities are not limited to commercial mobile radio licensees, but also will include other Commission licensed wireless common carriers such as point to point microwave in the extremely high frequency portion of the electromagnetic spectrum which rely on line of sight for transmitting communication services.

Appendix C: Affidavits and other documents

- Alison Rall: Reports shortly after a 400 foot cellular tower was erected next to their farm that their beef herd became sickly, egg production dropped, wild fowl left the area, dairy cows had "many miscarriages, birthing problems, suckling problems, and many of them developed tumors. * * * Our five children all began experiencing frequent nosebleeds, hair loss, weight loss, and kidney problems."

- **David Fichtenberg:** "Because of our purpose, AHA (Ad Hoc Association), and I believe all of our members, want to influence local public officials so they may establish regulation of RF more stringent than those of the FCC to protect health, safety, and quality of life. * * * AHA has been harmed because it believes its members and the public it serves would likely have benefited from more stringent RF exposure limits had the studies it submitted to the FCC been evaluated.

- **Charles R. Manville:** "In June 1997 [one month after installation of a cellular tower I began to experience frequent headaches and dizziness when I was at my home on Willis Hill. * * * Until I began to experience headaches and dizziness in June, I had never experienced recurrent headaches or dizziness and had been in excellent health. * * * In September I spent a week on Penobscot Bay, Maine and my headaches went away completely. Those headaches and dizziness returned within a day of my return to Willis Hill.

Affidavits continued:

- **Janet and Dale Newton, Lorinda Knowlton, Roger H. Knowlton, D.O.** :"When I attended hearings on this subject [cellular phone tower zoning and permitting] I was informed that there could be no discussion in the record on environmental or health concerns again for fear of a court challenge by any provided that decisions were even indirectly based on health or environment concerns."

- D. Fichtenberg, supplementary affidavit:

Declaration of
David Fichtenberg
PO Box 7577
Olympia, WA 98507-7577

Pertaining to Supreme Court of the United States,
Petition for certiorari of David Fichtenberg, docket #00-0407

I, David Fichtenberg, hereby declare that I am over 21 years old and reside in King County of the State of Washington.

On June 10, 1998, I submitted an affidavit pertaining to Court of Appeals for the Second Circuit consolidated cases 97-4328(L), 98-4003 (Con.), 98-4005 (Con.), 98-4025(Con.), 98-4122(Con.). Since then, significant changes of which I am aware are: (1) parties who were Ad Hoc Association members and whose interest Ad-Hoc Association had sought to represent in the Second Circuit proceeding above have since chosen to have their interests and representation furthered through the law firm of Landy & Seymour. They have had a Petition for Writ of Certiorari filed in their behalf (Citizens for Appropriate Telecommunications Facilities et al. ("Citizens"), docket #00-00393) by counsel of record Whitney North Seymour, Jr. of the firm of Landy & Seymour. Among these are persons whose names also appear in

my June 10, 1998 affidavit are Dorothy Miller, Holly Fournier, and Libby Kelly. Please see the Citizens petition for a complete list of the names of these parties. (2) Also a motion to the Second Circuit in the above proceeding there was filed August 27, 1998 to correct my June 10, 1998 affidavit by clarifying that Cellular Phone Taskforce was not a member of Ad-Hoc Association.

I remain President of Ad-Hoc Association. Some of our members who participated in the proceeding below are Alan Golden, Virginia J. Moore-Ward, Rainer Waldman Atkins, Michael C. Worsham, Bill Jenkins, and Faye Mueller-Hebert. My principal duties are to carry out the Ad-Hoc Association mission is described in my June 10, 1998 affidavit, at pages 11-15 of my above petition for writ of certiorari, and at pages 2-6 of the principal brief in which Ad-Hoc Association and I joined in the Second Circuit proceeding. I am being harmed in carrying out my duties for Ad-Hoc Association in the manner as described in these referenced pages for Ad-Hoc Association to further its mission.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on: October 4, 2000

Signed: /s/ David Fichtenberg

_____

David Fichtenberg

C4 (60)

Notice that all parties to proceeding below, except CPT Joined in same brief and reply

October 7, 1998

Carolyn Clark Campbell, Clerk
U.S. Court of Appeals for the Second Circuit
United States Court House, 40 Foley Square
New York, New York 10007

Re: Cellular Phone Taskforce, No. 97-4328, and consolidated cases

Attention: Michael Adragna

Dear Ms. Campbell:

Petitioners in the referenced cases filed initial briefs May 22, 1998 and reply briefs July 27, 1998. Two of the Petitioners, Ad-Hoc Association et al. and CWA filed jointly. The second set of briefs came from a single party, Cellular Phone Taskforce.

As you know, the caption of the case recites the names of a number of other individuals and associations who are participating in the appeals. Originally, they were co-petitioners, with Ad-Hoc Association, in Nos. 98-4003 or 98-4025 filed respectively in the D.C. and Ninth Circuits.

The purpose of this letter is to clarify that these individuals and associations are also joined – through common representation with Ad-Hoc Association – in the initial and reply briefs submitted by Ad-Hoc Association and CWA. Specifically, all the captioned parties except Cellular Phone Taskforce are joined in the briefs submitted by Ad-Hoc Association and CWA/CWA Local 7810.

We appreciate the Court's indulgence in permitting this clari-

fication. Please direct any questions to the undersigned.

Sincerely,

/s/ James R. Hobson
James R. Hobson
Counsel for Ad-Hoc Association et al.

c.c. Michael Adragna; all parties of record

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of RAINER VALLEY ASSOCIATION FOR SAFE WIRELESS TECHNOLOGY	Hearing Examiner File No. MUP-96-038 DCLU File No. 9603542

ORDER OF DISMISSAL

This matter involves property located at 4213 South Orcas Street. Under application 9603542, the applicant (the Walter Group) proposed construction on the property of a minor communication utility consisting of 12 panel type antennae. On October 10, 1996, DCLU published notice of its decision, in which it recommended that the required Council Conditional Use be granted, and in which it entered a Determination of Non-Significance (DNS). The effect of a DNS is to relieve the applicant of the need to prepare an Environmental Impact Statement (EIS).

On October 24, 1996 David Fichtenberg filed an appeal on behalf of the Rainier Valley Association for Safe Wireless Technology, challenging the failure of DCLU to require an EIS. That appeal was based on the possible environmental impacts of the radiofrequency radiation that would be associated with the proposed facility.

On October 31, 1996, the applicant (the Walter Group) filed a motion with the Hearing Examiner seeking dismissal of the

appellant's SEPA appeal. In this motion, the applicant argued that the federal government had preempted the ability of State or local government to regulate wireless service facilities on the basis of the environmental effects of radio frequency emissions.

A response to the applicant's motion was filed by the appellant on November 12, 1996. In that response, the appellant contested whether the federal government had, indeed, preempted local control over questions of radio frequency emissions. The appellant also argued that even if there was preemption, an EIS should still be prepared.

As to the first issue, the Telecommunications Act of 1996 added the following paragraph (iv) to 47 USC sec. 332(c):

> "No State or local government or instrumentality thereof may regulate the placement, construction or modification of personal wireless services facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communication] Commission's regulations concerning such emissions."

In August of 1996, the FCC issued its "Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation [ET Docket 93-62 (FCC 96-326)]. That order adopted Maximum Permitted Exposure (MPE) standards.

The proposed facility complies with the FCC's MPE standards. Accordingly, the City of Seattle is preempted from regulating the proposed minor communications utility on the basis of the environmental impacts of its radio frequency emissions.

The second issued then is whether, in the face of this preemption, the Hearing Examiner retains the ability to require an EIS in this case. The answer to that question is "no."

SMC 25.05.340(A) provides that a DNS is appropriate when the responsible official determines that "there will be no probable sufficient environmental impacts from a proposal . . . . SMC 25.05.4000 sets forth the purpose of an EIS; Paragraph B provides that an EIS "shall inform decision makers and the public of reasonable alternatives, including mitigation measures, that would avoid or minimize adverse impacts or enhance environmental quality."

The appellant's appeal is based entirely on the possible environmental effects of RF radiation. Therefore, to reverse the Department in this case, the Examiner would have to determine that environmental impacts of RF radiation, the very thing over which the City has no jurisdiction, creates a "probable significant impact." Moreover, because the City is preempted from regulating the proposed facility on the basis of the environmental effects of RF radiation, any EIS prepared to explore those impacts could not be used to regulate or mitigate whatever adverse impacts there were revealed. This would be an absurd result.

This is not to suggest that the construction of a minor communications utility could never require the preparation of an EIS. Such a requirement could still be appropriate when other impacts from protected City viewpoints, etc. were at issue. However, such concerns were not raised by this appeal.

On the basis of the above, this appeal from the Determination of Non-significance entered by DCLU in this case should be, and hereby is, DISMISSED. The pubic hearing on November 26, 1996 will be limited to testimony and evidence regarding the proposal's compliance with the requirements for a council conditional use.

Entered this 14th day of November, 1996.

/s/ Guy E. Fletcher
Guy E. Fletcher, Deputy Hearing Examiner

C 9

Office of Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104
(206) 684-0521
(2 0 6) 6 8 5 - 0 5 3 6 (F A X)

C10

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010
from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use	ORDER ON MOTION TO DISMISS

The Department has moved to dismiss certain issues from the above-referenced appeal. Both the Department and the appellant have submitted written information regarding the motion, and the motion was discussed at the prehearing conference on this matter. The appeal issues are identified in the appellant's appeal letter dated November 3, 1999. At the conference, appellant and the Department agreed that the issue pertaining to failure to provide notice of the DNS should be dismissed.

Many of the other issues raised by the appellant's appeal letter are not properly the subject of a SEPA appeal in this case, for they relate to matters that are not changed by the ordinance. The appellant has argued that the failure to amend the ordinance (in particular, the radio frequency (RF) standards) in certain ways will have an impact.

* * *

Entered this 6th day of December, 1999

/s/ Anne Watanabe
Anne Watanabe, Deputy Hearing Examiner
Room 1320 Alaska Building
618 Second Avenue
Seattle, WA 98104-2222
(206) 684-0521
FAX: (206) 684-0536

C12

BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeal of SEATTLITES FOR APPRORIATE ANTENNAS IN OUR NEIGHBORHOODS (SAANE)	Hearing Examiner File No. W-99-010

from a Determination of Nonsignificance (DNS) by the Director of the Department of Design, Construction, and Land Use

The Director issued as Determination of Non-Significance (DNS) regarding a proposal to amend Title 23 and Title 25 of the Seattle Municipal Code. The appellant exercised the right to appeal pursuant to SMC 25.05.680.

The appeal hearing was held on December 13, 1999, before the undersigned Deputy Hearing Examiner (Examiner). Parties represented at the proceeding were: the appellant, SAANE et al, by David Fichtenberg; and, the Director, Department of Design, Construction, and Land Use (DCLU by Bernard J. Glynn Jr., Assistant City Attorney.

* * *

The Determination of Nonsignificance issued by the Director is hereby AFFIRMED.

Entered this 5th day of January, 2000.

/s/ Anne Watanabe
Anne Watanabe
Deputy Hearing Examiner

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Office of
The Chairman

Federal Communications Commission
Office of the Secretary

July 1, 1996

The Honorable Carol M. Browner
Administrator
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Carol:

I am writing to follow-up on our phone conversation of several weeks ago regarding radiofrequency (RF) emissions and Commission's efforts to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. This is one of the more important issues we are wrestling with, and I believe it is critical that we do all we can to protect the public and workers from any potential health effects from the radio services we license.

As you know, in 1993, the FCC released a Notice of Proposed Rule Making (NPRM; ET Docket 93-62) seeking public comment on these issues. At that time we requested that EPA and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers.

Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the EPA as well as the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the National Institute for Occupational Safety and Health (NIOSH).

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the EPA recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, NIOSH believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard. Similarly, the Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the EPA and by the other federal health and

safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Read E. Hunt
Read E. Hunt
Chairman

C16

(72)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

Federal Communications Commission
Office of the Secretary

July 2, 1996

D. Bruce Burlington, M.D.
Director
Center for Devices and Radiological Health
U.S. Food and Drug Administration
Mail Code HFZ-1
5600 Fishers Lane
Rockville, MD 20857

Dear Dr. Burlington:

In 1993, the FCC released a Notice of Proposed Rule Making (NPRM ET Docket 93-62) to update and amend the guidelines we use for evaluating human exposure to environmental RF energy emitted by FCC-regulated transmitters. At that time we requested that the Food and Drug Administration and other federal agencies with responsibilities for health and safety comment on the various issues raised in the NPRM including our proposal to adopt the guidelines developed by the Institute of Electrical and Electronics Engineers. Inc., (IEEE), and later endorsed by the American National Standards Institute (ANSI), designated ANSI/IEEE C95. 1-1992. In response, we received comments from the FDA as well as from other agencies.

The federal health and safety agencies generally expressed support for our efforts to update our RF exposure

guidelines. However, comments from our sister agencies included recommendations for alternatives to our original proposal to adopt the ANSI/IEEE guidelines. For example, the U.S. Environmental Protection Agency recommended that we consider adopting certain features of the ANSI/IEEE guidelines along with others recommended by the National Council on Radiation Protection and Measurements (NCRP). In many ways the ANSI/IEEE and NCRP guidelines are similar. However, as pointed out by the EPA, there are certain significant differences. For example, the EPA expressed its opinion that at microwave frequencies the limits specified by NCRP would be preferable. Likewise, the National Institute of Occupational Safety and Health (NIOSH) believed that it would be more appropriate to use the MPE limits recommended by NCRP, but did support the adoption of the ANSI/IEEE limits on induced RF currents. The Occupational Safety and Health Administration (OSHA) generally supported the ANSI/IEEE standard, but objected to the way it defined the use of two different exposure tiers to protect the public and workers, respectively. The FDA generally supported our adoption of the ANSI/IEEE standard, but expressed significant concern about the radiated power exclusion clause included in the standard.

W e accord great weight to the views of our sister health and safety agencies who have primary responsibility in these areas. Therefore, in developing the new guidelines, FCC staff is considering an approach that, we believe, accommodates all the comments we received and responds to the recommendations made by the FDA and by the other federal health and safety agencies. Generally, this approach incorporates elements from both ANSI/IEEE and NCRP, and includes: 1) adoption of limits for field strength and power density limits based on NCRP recommendations (the ANSVIBBE and NCRP limits are similar up to 1500 MHz, above which NCRP has different MPE limits); 2) adoption of ANSI/IEEE limits for localized specific absorption rate (SAR) (again, similaT to NCRP); 3) deferring adoption of

the ANSI/IEEE radiated power exclusion clause pending possible future consideration of a modified version; 4) a categorical exclusion policy for certain transmitters: and 5) endorsement of measurement procedures described in ANSI/ IEEE C95.3 and NCRP Report No. 119.

Upon completion of your review of this approach, we seek your written comments concerning whether this approach is consistent with your views and adequately addresses your concerns. We will place your letter in the record of the role-making docket.

Under the Telecommunications Act of 1996 the Commission is required to complete action in this proceeding by early August. Therefore, we would appreciate your early consideration of this request. If you or your staff have any questions please contact me at (202) 418-1000 or Dr. Robert Cleveland, of our Office of Engineering and Technology, at (202) 418-2422.

I look forward to your timely response.

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering and Technology

Excerpts from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996)

43. Accordingly, "occupational/controlled" exposure, as used by the Commission, will apply to situations in which persons are exposed as a consequence of their employment and in which those persons who are exposed have been made fully aware of the potential for exposure and can exercise control over the their exposure. Occupational/controlled exposure will also apply where exposure is of a transient nature as a result of incidental passage through a location where exposure levels may be above general population/uncontrolled limits (see below), as long as the exposed person has been made fully aware of the potential for exposure and can exercise control over his or her exposure by leaving the area or by some other appropriate means. We will apply the occupational/controlled exposure limits to amateur radio operators and members of their immediate household, as discussed later (see para. 162, infra).

47 CFR 1.1310 NOTE 1 TO TABLE 1: Occupational/ controlled limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/ controlled exposure also apply in situations when an individual is transient through a location where occupational/ controlled limits apply provided he or she is made aware of the potential for exposure.

71. Based on the concerns expressed by the FDA, we are not adopting at this time low-power device exclusions based on radiated power, as contained in the 1992 ANSI/ IEEE guidelines. As discussed above, the FDA cites recent studies indicating that cellular telephones and other hand-held transmitters that meet ANSI/IEEE radiated power exclusion limits can exceed the corresponding exclusion limits for SAR. In one of those studies, the highest SAR values were

measured when the antennas and cases of various hand-held cellular telephones were placed in direct contact with a head model, i.e. less than 2.5 cm from the head. Of six telephone models tested in this study under these "worst case" conditions, the highest SAR obtained was approximately 8.8 mW/gram (8.8 W/kg) for 1 watt of output power. This SAR exceeds the recommended limit of 1.6 W/kg for an uncontrolled environment, suggesting that an appropriate radiated power exclusion level for ensuring that the 1.6 W/kg SAR limit could not be exceeded under "worst case" conditions would be on the order of 180 mW at 900 MHz. The ANSI/IEEE low-power device exclusion clause allows for exclusions at a power level of 700 mW at 900 MHz provided a separation of 2.5 cm is maintained between the radiating structure of the device and the body of the user, although, as discussed earlier, comments submitted in this proceeding maintain that the 2.5 cm distance was not meant to apply to the head.

72. This study also reported SAR values measured when the telephones were positioned normally against the head model (i.e., less than 2.5 cm from the head), but with the antenna at various angles and distances from the head. This was referred to as "standard" handling of the telephone. For this "standard" operating situation, the highest SAR measured from the six models tested was approximately 2.8 W/kg for 1 watt of power. This implies that, for the "standard" exposure condition, an appropriate "worst case" radiated power level to meet the 1.6 W/kg SAR limit at 900 MHz should be on the order of about 570 mW, not 700 mW as recommended by the 1992 ANSI/IEEE standard. Similarly, recent data submitted to our laboratory analyzing SAR values for hand-held PCS devices operating near 2 GHz shows that at 125 mW of average power maximum, SAR values (averaged over 1 gram) can, in some cases, be up to 80-90% of the 1.6 W/kg limit. The 1992 ANSI/IEEE radiated power exclusion clause applies only to frequencies up to 1500 MHz. However, if this exclusion were extrapolated to PCS frequencies (1850-1990 MHz), the radiated power exclusion limit would be in the

range of 300-350 mW, more than twice the 125 mW used by the devices tested. Therefore, it would appear that some devices that would qualify for the radiated power exclusion in the 1992 ANSI/IEEE standard might exceed the SAR limit of 1.6 W/kg.

73. As noted by the FDA, these studies raise questions about the accuracy of the low-power device exclusions based on radiated power as contained in the 1992 ANSI/IEEE guidelines. We acknowledge, however, that all of the transmitters in the devices in these studies were placed directly against the head and did not maintain the 2.5 cm separation distance required by ANSI. However, as discussed above, it is unclear whether that separation distance was meant to apply to the head. In light of these outstanding issues and questions, we do not feel that, at this time, it is appropriate for us to adopt the low power exclusion. On the other hand, we also recognize that to require SAR evaluation of every low-power transmitting device subject to Commission authorization would prove to be a costly and unnecessary burden for many manufacturers. Therefore, at this time we will require only routine SAR evaluation for the devices noted above that constitute the classes for which there appears to be the greatest potential for exposure because of their relatively higher duty factors. Based on additional scientific evidence that may be forthcoming, we may consider modifying or expanding this requirement, and we may also consider whether a modified exclusion clause based on radiated power can be adopted.

Notice FCC 96-326, Appendix A: Final Regulatory Flexibility Analysis

4. Summary of Projected Reporting, Recordkeeping and Other Compliance Requirements:

Other Compliance Requirements

As was true for the previous rules, there are no specific compliance requirements, as such. Under the Commis-

sion's NEPA rules, applicants and licensees are required to submit an Environmental Assessment (EA) if they do not comply with our RF exposure guidelines (47 CFR § 1.1311). An EA is a detailed accounting of the consequences created by a specific action that may have a significant environmental impact, in this case a Commission authorization of a transmitter or facility that exceeds the RF guidelines. An EA would be evaluated by the Commission to determine whether the authorization should be granted in view of the environmental impact. In reality, this leads to a de facto compliance requirement, since most applicants and licensees who are not categorically excluded (see above) undertake measures to ensure compliance before submitting an application in order to avoid the preparation of a costly and time-consuming EA. For this reason EAs are rarely filed with the Commission. This has not changed from the existing rules.

National Radiation Protection and Measurement (NCRP) Report 86: Biological Effects and Exposure Criteria For Radiofrequency Electromagnetic Fields.
Sec. 17.4.3 Time Averaging for the General Population

The time base by which to average the limiting *SAR* for occupational exposure is 0.1 h (6 minutes). For exposure of the general population an averaging period of 0.5 h (30 min) is recommended. The increased stringency of the general-population limit allows this liberalization with no significant additional risk because the population limit, along with the 30-min time-averaging period, restricts the maximal *SA* to the population during the 30-min period to a value of no larger than that experienced during the 6-min time-averaging period of occupational exposure. Overall, the SA for the population remains at one-fifth that of the occupational value. At the same time, the 30-min time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM sources, and brief exposure to civil telecommunications systems. [emphasis added]

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

Mr. Arthur Firstenberg
P.O. Box 684
Norwich, N.Y. 434-4499

This is in response to your request of March 9, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. Sec 552. You request a copy of the draft Report & Order, dated July 2, 1996 in ET Docket No. 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC").

As your letter notes, I recently denied a request for the identical document filed by Mr. James Hobson. You attached a copy of my denial to your request. As I stated in my denial to Mr. Hobson, the draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec.0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). For the reasons set forth in my letter to Mr. Hobson, a copy of which is appended hereto, I am hereby denying your above-referenced request. You may file an application for review of any part of this decision with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F. R. Sec. 0.461(i).

Sincerely;

/s/ Richard M. Smith
Chief
Office of Engineering & Technology

Enclosure

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

[FCC]
[SEAL]

MAR 20, 1998

James R. Hobson, Esq.
Donelan, Cleary, Wood & Maser, P.C.
1100 New York Ave – Suite 750
Washington, D.C. 20005

Dear Mr. Hobson,

This is in response to your request of February 11, 1998 pursuant to the Freedom of Information Act (the "FOIA"), 5 U. S.C. Sec. 552. You request copies of the draft Report & Order, dated July 2, 1996 in ET Docket 93-62 that was coordinated with the Interdepartment Radio Advisory Committee (the "IRAC") as well as any transmittal letter or Memorandum from the FCC to IRAC member agencies that summarizes or explains the contents of the draft Report & Order.

The draft Report & Order is a predecisional document which is exempt from disclosure pursuant to Exemption 5 of the FOIA, 5 U.S.C. Sec.(b)(5) and Sec. 0.457(e) of the Commission's Rules, 47 C.F.R. Sec. 0.457(e). It was clearly part of the deliberative process of the agency in that it represents the recommendation of the Office of Engineering & Technology made in consultation with other Commission Bureaus and Offices, to the FCC Commissioners.

Release of the draft document would threaten "the give and take of the deliberative process" see Chemical Manufacturers Ass'n v. Consumer Prod. Safety Comm. 600 F.Supp. 114, 118(D.D.C 1984). The deliberative process aspect of Exemption 5 is rooted in three distinct policy purposes: (1) to en-

courage frank discussion within Government; (2) to prevent public confusion that could result from the disclosure of the internal debate prior to the formulation of agency policies; and (3) to guarantee that the Government will be judged on positions actually adopted rather than on factors considered in reaching such positions. Jordan v. Dep't of Justice, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc). The concerns underlying Exemption 5 are directly applicable to the instant case.

Nor does the fact that the draft Report & Order was circulated to the IRAC alter the privileged nature of the document. The draft Report & Order was circulated to the IRAC as part of the normal IRAC review process applicable to decisions which could have an impact on other federal agencies. It was apparently submitted to the IRAC without any cover letter or other transmittal memorandum. All comments received were, if written, placed in the docket of the proceeding and, if oral, were summarized, and summaries thereof were placed in the docket file.

Exemption 5 and Sec. 0.457(e) clearly protect interagency documents as well as intra-agency documents. Indeed, it would undermine the purpose behind the exemption if a document which would, in absence of disclosure to other agencies pursuant to the IRAC process, be a privileged intra-agency document, were to lose its privilege merely because the IRAC process required it to be circulated to other Federal agencies. Disclosure of the document in question would reveal aspects of the Commission's as well as of the Government's deliberative process by providing a meaningful glimpse into the thoughts of agency personnel involved in the creation thereof. Thus, the document falls within the Exemption 5 of the FOIA.

Your letter states that documents which would ordinarily be privileged pursuant to Exemption 5 "lose the protection if an agency, in the making of a final decision, chooses expressly to adopt them or incorporate them by reference." The docu-

ment in question is a draft document; neither it nor the final version of the Report & Order reflect any information not contained in the public record. The Report & Order that was eventually adopted may differ in some respects from the document in question because it incorporated comments received from the Commissioners as well as staff of this agency and the staffs of some of the other agencies which received the draft pursuant to the IRAC consultative process. It does not adopt or incorporate by reference any documents received from those agencies. Consequently, I do not believe the line of cases you cite in this regard is apposit.

For the aforementioned reasons, I am hereby denying your above request. You may file an application for review of any part of this initial decision which you find unsatisfactory with the Commission's Office of General Counsel within 30 days in accordance with 47 C.F.R. Sec. 0.46(I).

Sincerely,

/s/ Richard M. Smith
Richard M. Smith
Chief
Office of Engineering & Technology

Footnote #1 from Notice FCC 96-326, Report & Order in ET-Docket 93-62, and reported at 11 F.C.C. Rcd. 15123 (1996).

Specifically, we are adopting limits for field strength and power density that are generally based on Sections 17.4.1 and 17.4.2, and the time-averaging provisions recommended in Sections 17.4.1.1 and 17.4.3, of "Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields," NCRP Report No. 86 (1986), National Council on Radiation Protection and Measurements (NCRP). With the exception of the limits on exposure to power density above 1500 MHz and the limits for exposure to lower frequency magnetic fields, these MPE limits are also generally based on the guidelines contained in the RF safety standard developed by the Institute of Electrical and Electronic Engineers, Inc. (IEEE) and adopted by the American National Standards Institute (ANSI). See Section 4.1 of ANSI/IEEE C95.1-1992, "Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz".